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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 648

UNITED STATES OF AMERICA, PETITIONER

v.

D. B. HELLARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The district court wrote no opinion. Its findings of fact, conclusions of law, and judgment appear in the record at pages 19–25. The opinion of the circuit court of appeals (R. 27–31) is reported in 138 F. 2d 985.

JURISDICTION

The judgment of the circuit court of appeals was entered October 29, 1943 (R. 31). The petition for a writ of certiorari was filed January 29, 1944, and was granted March 6, 1944 (R. 32). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether full-blood Indians of the Five Civilized Tribes can be divested of title to restricted land by a sale in a partition proceeding to which the United States is not a party.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 25–28.

STATEMENT

On March 20, 1940, certain full-blood Creek Indians instituted in the District Court of Creek County, Oklahoma, proceedings for the partition of a quarter-section of land which they had inherited from their ancestor, also a full-blood Creek Indian, to whom the land had been allotted as her distributive share of the tribal lands of the Creek Tribe of Indians (R. 3–5, 16–18).[1] The United States was not named as a party to this suit, nor was notice of the pendency thereof served upon the Superintendent for the Five Civilized Tribes under section 3 of the Act of April 12, 1926, 44 Stat. 239[2] (R. 18). On June 24, 1940,

[1] Under Section 23 of the Act of March 1, 1901, 31 Stat. 861, as supplemented by the Act of June 30, 1902, 32 Stat. 500, pursuant to which the land was allotted, the allottee acquired title in fee, subject to restrictions against alienation.

[2] This Section, reproduced in the Appendix, *infra*, pp. 26–28, provides for notice to the United States of suits in the federal or state courts involving title to or an interest in the restricted lands of Five Civilized Tribes Indians and the removal of state court suits to the federal courts at the option of the United States.

judgment of partition was entered therein, and pursuant to that judgment the land was sold and a sheriff's deed in partition was issued to respondent, D. B. Hellard (R. 5, 18).

On July 5, 1941, Hellard filed in the same court the present action against the Indian heirs to quiet his title founded on the deed in partition (R. 3–5). The heirs answered disclaiming interest (R. 8). Hellard caused notice of the pendency of the suit to be served upon the Superintendent for the Five Civilized Tribes (R. 7), and at the instance of the United States the cause was removed to the federal district court, all pursuant to section 3 of the Act of April 12, 1926, Appendix, *infra,* pp. 26–28 (R. 9–11). After removal, the United States filed a complaint in intervention on behalf of itself and the heirs, alleging that the heirs were restricted Indians, that the partition proceedings were void for lack of the United States as a party, and that those proceedings were also void for want of service of notice thereof on the Superintendent of the Five Civilized Tribes as required by section 3 of the Act of April 12, 1926, *supra* (R. 13–15). The prayer was that the deed in partition be set aside and title quieted in the heirs (R. 14–15). Hellard answered, denying that the United States was an indispensable party to the partition proceedings and alleging that those proceedings were valid and binding (R. 15–16).

The district court adjudged that the partition proceedings were valid even though the United States was not a party thereto and on October 30, 1942, entered findings of fact, conclusions of law and judgment quieting title in Hellard (R. 19–25). On October 29, 1943, the circuit court of appeals affirmed (R. 31).

SUMMARY OF ARGUMENT

Since the heirs are of the full Indian blood (R. 20), the lands involved are subject to restrictions on alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495; Act of January 27, 1933, sec. 8, 47 Stat. 777. Cf. *Parker* v. *Richard,* 250 U. S. 235, 238. Because of these restrictions, the land is property in which the United States has an interest. Cf. *Heckman* v. *United States,* 224 U. S. 413, 437–438; *Bowling and Miami Investment Co.* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 204; *Sunderland* v. *United States,* 266 U. S. 226, 232–233. Any proceeding against property in which the United States has an interest is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382, 386–387. While Congress, by Section 2 of the 1918 Act (Appendix, *infra,* p. 25), authorized the bringing of partition actions against restricted land such as here involved by

making the lands "subject to the laws of the State of Oklahoma, providing for the partition of real estate", it did not thereby remove the restrictions in event of the filing of a partition proceeding or consent to the maintenance of such actions in the absence of the United States. Cf. *Minnesota* v. *United States*, 305 U. S. 382, 387–388. Accordingly, the partition proceedings here involved are void, inasmuch as the proceedings were had without the presence of the United States.

Respondent would have been protected if notice of the partition proceeding had been served on the United States pursuant to Section 3 of the Act of April 12, 1926, which establishes a uniform procedure whereby the United States can be served and bound in proceedings involving title to restricted land of an Indian of the Five Civilized Tribes. It has been customary so to serve the United States in these partition proceedings and the United States is expressly concluded by the judgments where so served. Moreover, by virtue of the statutes of limitations of the State of Oklahoma made applicable by Section 2 of the 1926 Act, the United States cannot now attack any title derived from a partition before 1926, or from any partitions after 1926 where the applicable statute of limitations has run. Thus the danger of upsetting titles seen by respondent in the Government's position is exaggerated.

ARGUMENT

FULL-BLOOD INDIANS OF THE FIVE CIVILIZED TRIBES CANNOT BE DIVESTED OF TITLE TO RESTRICTED LAND BY A SALE IN A PARTITION PROCEEDING TO WHICH THE UNITED STATES IS NOT A PARTY

A. *The United States is an indispensable party to proceedings against restricted land.*—The heirs are all Creek Indians of the full-blood (R. 20). Hence, the land involved is subject to restrictions on alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312, as amended April 12, 1926, sec. 1, 44 Stat. 239, and extended May 10, 1928, sec. 2, 45 Stat. 495;[3] Act of January 27, 1933, sec. 8, 47 Stat. 777.[4] Because of these restrictions, the land is property in which the United States has an

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[3] Section 9, as amended, reads:

"The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided*, That hereafter no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator * * *."

By Section 2 of the 1928 Act, *supra*, the restriction thus imposed was continued in force until April 26, 1956.

[4] Section 8 provides that:

"* * * no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914 * * *."

interest. *Heckman* v. *United States,* 224 U. S. 413, 437–438; *Bowling and Miami Investment Co.* v. *United States,* 233 U. S. 528, 534–535; *Privett* v. *United States,* 256 U. S. 201, 204; *Sunderland* v. *United States,* 266 U. S. 226, 232–233. "While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. * * * A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Heckman* v. *United States, supra,* at pp. 437, 438. Since the land is property in which the United States has an interest, any proceeding against it is a suit against the United States, and the United States is an indispensable party thereto. *Minnesota* v. *United States,* 305 U. S. 382, 386–387.

B. *Section 2 of the Act of June 14, 1918, does not remove restrictions in the case of partition proceedings.*—By this section (Appendix, *infra,* p. 25) Congress authorized the bringing of partition actions against restricted lands by subjecting them "to the laws of the State of Oklahoma, providing for the partition of real estate," but it did not thereby permit the bringing of such actions in the absence of the United States. Under section 2 restrictions are not removed from restricted allotments unless and until the land is

sold at partition sale, an exception designed only to afford a marketable title to purchasers at partition sales. If partitioned in kind to full-bloods, the allotments remain restricted. Accordingly, the interest of the United States exists throughout partition proceedings.

Its interest lies in representing the Indians in such proceedings in the selection and appointment of commissioners; in obtaining partition in kind if feasible, in conformance to its general policy to preserve restricted land for the Indians; and where the property is ordered sold, in protecting the right of the Indian to elect to take at the appraised value or in soliciting for prospective bidders, so that the best possible price may be obtained. The United States is also interested in having the proceeds of these sales retained under federal supervision;[5] and where the land is tax-exempt as well as restricted, as it is in this case (R. 19), in effectuating the authority of the Secretary of the Interior under the Act of June 30, 1932, 47 Stat. 474 (25 U. S. C. sec. 409a), to determine that the proceeds shall be reinvested in other lands correspondingly tax-exempt and re-

[5] In contrast to the statute involved in the *Minnesota* case, Section 2 of the 1918 Act (Appendix, *infra*, p. 25) does not specifically provide that the proceeds shall be paid to the Indians. Nor does section 2, expressly or impliedly, authorize any court to determine whether or not such proceeds shall be retained under supervision. If any power or duty to retain the proceeds under supervision exists, it "naturally falls to the Secretary of the Interior." Cf. *Parker* v. *Richard*, 250 U. S. 235, 240.

stricted.[6] It is interested, too, in making it possible for the Secretary of the Interior to exercise his preferential right to purchase the land at the sale, under the Act of June 26, 1936, sec. 2, 49 Sat. 1967.[7] See 25 Code of Federal Regulations, sec. 241.13.

Minnesota v. *United States*, 305 U. S. 382, justifies the view that a statute such as Section 2 of

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[6] The Act of June 30, 1932, reads:

"That whenever any nontaxable land of a restricted Indian of the Five Civilized Tribes or of any other Indian tribe is sold to any State, county, or municipality for public-improvement purposes, or is acquired, under existing law, by any State, county, or municipality by condemnation or other proceedings for such public purposes, or is sold under existing law to any other person or corporation for other purposes, the money received for said land may, in the discretion and with the approval of the Secretary of the Interior, be reinvested in other lands selected by said Indian, and such land so selected and purchased shall be restricted as to alienation, lease, or incumbrance, and nontaxable in the same quantity and upon the same terms and conditions as the nontaxable lands from which the reinvested funds were derived, and such restrictions shall appear in the conveyance."

[7] Section 2 of the 1936 Act reads:

"Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas, or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor."

the 1918 Act does not remove restrictions and that the governmental interest which the United States has in partition proceedings is such as to require that it be made a party thereto. In that case, this Court held that the United States is an indispensable party to condemnation proceedings under Section 3 of the Act of March 3, 1901, 31 Stat. 1058, 1083–84 (25 U. S. C. sec. 357), which provides:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

This Court said (pp. 387–388):

> Minnesota contends that the United States is not an indispensable party. It argues that since the second paragraph of § 3 of the Act of March 3, 1901, provides that "the money awarded as damages shall be paid to the allottee," the United States has no interest in the land or its proceeds after the condemnation is begun. Under § 5 of the General Allotment Act, Act of February 8, 1887, c. 119, 24 Stat. 388, 389, U. S. C. Title 25, § 348, the Indians' interest in these allotted lands was subject to restraints on alienation; and by § 2 of the Indian Reorganization Act, Act of June 18, 1934, c. 576, 48 Stat. 984, U. S. C. Title

25, § 462, restraints on alienation were extended. The clause quoted may not be interpreted as freeing the allottee's land from the restraint imposed by other acts of Congress. As the parcels here in question were restricted lands, the interest of the United States continues throughout the condemnation proceedings. In its capacity as trustee for the Indians it is necessarily interested in the outcome of the suit—in the amount to be paid. That it is interested, also, in what shall be done with the proceeds is illustrated by the Act of June 30, 1932, c. 333, 47 Stat. 474, U. S. C. Title 25, § 409a, under which the Secretary of the Interior may determine that the proceeds of the condemnation of restricted Indian lands shall be reinvested in other lands subject to the same restrictions."

The statute here involved authorizing partition "subject to the laws of the State of Oklahoma" does not diminish the interest of the United

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"In the *Minnesota* case, the United States owned the fee. The opinion written by Mr. Justice Brandeis (p. 386, n. 1) makes it clear that this was not the crucial factor. It is the "powers and responsibilities" or the governmental obligations of the United States with respect to restricted Indian land which is controlling. In *Town of Okemah* v. *United States* (C. C. A. 10), decided February 18, 1944, the circuit court of appeals accordingly applied the doctrine of the *Minnesota* case in a suit involving condemnation of restricted land belonging to Indians of the Five Civilized Tribes. Copies of the *Okemah* opinion are filed with the Clerk.

States, or remove the restrictions, any more than the statute permitting condemnation "for any public purpose under the laws of the State or Territory." Just as the United States continues to have an interest in and is an indispensable party to condemnation proceedings against restricted Indian lands, it continues to have an interest in and is an indispensable party to partition proceedings.

C. *The reasons advanced by the court below for its holding that the United States is not an indispensable party to partition proceedings are not sound.*—The circuit court of appeals sought (R. 30–31) to distinguish the *Minnesota* case on the ground that the condemnation statute authorizes suits in the federal courts, whereas the Partition Act authorizes suits in the state courts, and that therefore "the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state." Although Congress did vest the state courts with jurisdiction over partition matters,* it is difficult to under-

* See H. Rep. No. 392, 65th Cong., 2d sess.; S. Rep. No. 330, 65th Cong., 2d sess.; 56 Cong. Rec. pp. 7317–7319. Prior to 1918 the state courts had no jurisdiction to partition the restricted lands of full-blood Indian heirs because such lands were not subject to involuntary alienation. Act of May 27, 1908, sec. 9, 35 Stat. 312; *Coleman* v. *Battiest*, 65 Okla. 71, 162 Pac. 786; *Lewis* v. *Gillard*, 70 Okla. 231, 173 Pac. 1136. Section 2 of the 1918 Act was intended to remove the impediment to their jurisdiction. Also the language of the Act,

stand why vesting state courts with jurisdiction should make them chosen instrumentalities to protect interests of the United States when in similar circumstances vesting federal courts with jurisdiction does not make them such instrumentalities. Between the two, the federal courts would seem to be the more logical recipients of such duties. Comparison of the language of the partition and condemnation acts does not support this distinction made by the court below, and certainly does not warrant the conclusion that the United States was to be deprived of its right to protect its interests in the usual manner through the Secretary of the Interior, in the partition case any more than in the condemnation case. And it is difficult to see how the functions the court is to perform can differ in the two types of cases. A partition suit is as much an adversary proceeding as is a condemnation suit. Equally in each the judge must be impartial and cannot adopt a special protective surveillance in behalf of those of the adversaries who happen to be full blood Indians. There is no basis in the statute for assuming that the state judges in partition proceedings are to drop their judicial attitude and assume the guardianship attitude of the

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"subject to the laws of the State of Oklahoma, providing for the partition of real estate," necessarily implies vesting of jurisdiction in the state courts. Cf. *United States* v. *Jones*, 109 U. S. 513, 515, 519–521.

Secretary of the Interior. Thus, the latter alone has statutory power to determine whether the proceeds of a partition sale shall be reinvested in other lands and whether his preferential right of purchase shall be exercised (see p. 9, *supra*, footnotes 6 and 7).

Except as to forum, Section 2 of the 1918 Act is similar to the statute involved in the *Minnesota* case, and the forum affords no basis for, but on the contrary argues against, depriving the United States of its right to safeguard its governmental interests in the restricted land of the Indians.

The circuit court of appeals also stated (R. 30) that when the partition statute was enacted, "there was no way under general law in which the United States could be joined in an action of that kind in a state court" and that the legislation should be construed in a manner "which will give it vitality from its inception." But, as in the *Minnesota* case, the United States impliedly consented to be sued when it consented to the bringing of partition proceedings, and it has always been possible to join it in the normal way, *viz.*, by service of process upon the United States Attorney and the Attorney General. Cf. *Town of Okemah* v. *United States* (C. C. A. 10), decided February 18, 1944. That the forum is a state court is no obstacle. Cf. *Minnesota* v. *United States*, 305 U. S., at pp. 389–390, n. 5; *United States* v. *Jones*, 109 U. S. 513, 515, 519–521.

The court below said (R. 30) that it has never been understood that proceedings to determine heirship under Section 1 of the 1918 Act (Appendix, *infra*, p. 25) or proceedings for the approval of conveyances by full-blood Indian heirs under Section 9 of the Act of May 27, 1908, 35 Stat. 312, as amended April 12, 1926, 44 Stat. 239 (*supra*, p. 6) are "void unless the United States is joined as a party or given notice" and it concluded that just as in "such instances the United States is represented by its chosen instrumentality—the county court," so "in an action in partition under the Act of June 14, 1918, *supra*, the interests of the United States are entrusted to an instrumentality of its own choice—the district court of the state." However, this argument by analogy is not persuasive that the United States is not a necessary party to partition proceedings.

The United States is not a necessary party to proceedings to determine heirship because the only interests directly involved in such proceedings are those of heirs. No governmental interest of the United States is directly involved, inasmuch as the restrictions on alienation do not prevent inheritance. Cf. *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 401, 413–414. Moreover, the determination of heirship does not directly affect the restrictions on the land or the land itself. The restricted property of the deceased Indian is not within the jurisdiction of the probate courts and is not sub-

ject to administration by those courts. *Cowokochee* v. *Chapman*, 90 Okla. 121, 124, 215 Pac. 759 (1922), certiorari denied, 263 U. S. 713; *March* v. *Peter*, 179 Okla. 207, 212–213, 64 P. 2d 912 (1936). By nature a proceeding to determine heirs is such that a probate court may render a valid judgment even though it does not have before it all possible claimants to heirship. In a partition suit, however, the district court must have jurisdiction not only of the land but of all parties representing every interest in the land before it has power to partition any of the land. The absence of any interest is fatal to the jurisdiction to partition. Cf. *Barney* v. *Baltimore City*, 6 Wall. 280.

Nor does comparison between the district court acting in partition proceedings and the county court acting in proceedings for the approval of conveyances of full-blood Indian heirs advance the argument of the court below. In the latter instance there is no doubt that the county court acts as a federal instrumentality. It was substituted for the Secretary of the Interior who formerly performed the same function. See Act of April 6, 1906, sec. 22, 34 Stat. 137. Congress designated the county court as it might have designated the Superintendent for the Five Civilized Tribes. Cf. *Parker* v. *Richard*, 250 U. S. 235, 238–239. That court is a probate court accustomed to acting in guardianship matters (cf. sec. 6 of the Act of May 27, 1908) and hence was

selected by Congress as a federal agency well qualified to perform the same role formerly exercised by the Secretary of the Interior.[10] In approving conveyances the county court performs no judicial duties. The function of the court is purely administrative. *Haddock* v. *Johnson,* 80 Okla. 250, 251, 194 Pac. 1077, 1079; *Molone* v. *Wamsley,* 80 Okla. 181, 182, 195 Pac. 484, 485–486.[11] When the court approves or disapproves a deed the United States is present through the court acting as its agent. The court can ade-

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[10] Cf. *United States* v. *Goldfeder*, 112 F. 2d 615 (C. C. A. 10) holding that as a condition of its approval of a full-blood Indian heir's exchange of restricted land for unrestricted land the county court could require that the deed to the Indian contain a restrictive clause forbidding alienation without the county court's approval.

[11] Writes of certiorari and like writs will not lie from an order approving or disapproving a conveyance, and the Supreme Court of Oklahoma is without power to promulgate any rules governing the county court's actions as a federal agency. *Haddock* v. *Johnson*, *supra*, p. 253. Nor is the county court bound by a state statute specifying a procedure to be followed in performing its federal duties. *Molone* v. *Wamsley*, *supra*, p. 183.

Prior to 1933 an appeal would not lie from an order disapproving such a conveyance. *In re Estate of Coachman*, 77 Okla. 185, 187 Pac. 465. By Section 8 of the Act of January 27, 1933, 47 Stat. 777, Congress directed that the approval be in open court after notice in accordance with the rules of the Supreme Court of Oklahoma governing procedure in probate matters, with the right of appeal by the probate attorneys provided for to the state district court for the district in which the county lay. This did not change the administrative nature of the function; it simply prescribed a change in the procedure to be followed.

quately protect the governmental interest since the proceedings for approval of conveyances, unlike partition proceedings, are non-adversary. Moreover, in such cases the power to convey is in the Indian, not in the court, and the alienation is voluntary and not by judicial process.[12] On the other hand, as noted, *supra*, p. 13, the state district court is a trial court of general jurisdiction poorly suited to the role of guardian which the court below would bestow on it in adversary proceedings looking toward the involuntary alienation of land through partition.

D. *A procedure for serving and binding the United States is that set forth in the Act of April 12, 1926.*—In order to provide a uniform means whereby the interests of the United States could be concluded in all cases affecting restricted Indian land, Congress enacted the Act of April 12, 1926, 44 Stat. 239. Section 3 of this Act provides for the service of notice of the pendency of the action upon the Superintendent for the Five Civilized Tribes and thereafter the United States is bound by the proceedings and judgment whether it appears or not. Provision is made for the appearance of the United States and at its option for removal to the federal district court.

[12] In addition, the United States provides protection for the Indians themselves by making provision for probate attorneys to appear and represent the Indians in those proceedings. Act of January 27, 1933, sec. 8, 47 Stat. 777. Cf. *Winton* v. *Amos*, 255 U. S. 373, 392.

Following the enactment of Section 3 it became customary in partition proceedings instituted under authority of Section 2 of the 1918 Act to bind the United States by serving notice on the Superintendent in the manner specified in the 1926 Act.[13] Where notice is served it is at present the uniform practice of the Government to remove partition cases to the federal court, file complaints in intervention, and to participate fully in the proceedings.

As to those litigants who failed to bind the United States under the 1926 Act, there still is available the protection of the statutes of limitations of the State of Oklahoma, which are made

[13] We are advised by the Interior Department that since the enactment of Section 3 the Superintendent has been served with notices in approximately 4,700 cases. Of these about 496 notices were served in actions to partition restricted land, as follows: 1926–1934, inclusive, 47; 1935—18; 1936—45; 1937—32; 1938—39; 1939—69; 1940—67; 1941—92; 1942—30; 1943—46; as of March 20, 1944—11. There are now 45 partition cases affecting restricted Indian land pending in the United States District Court for the Northern District of Oklahoma and in the United States District Court for the Eastern District of Oklahoma. It may be that since 1926 there were instituted partition proceedings affecting restricted Indian land in which no notice was served on the Superintendent. There is no practical way of determining the number of such instances. However, as it is now estimated that there are only some 23,000 full-blood Indians of the Five Civilized Tribes, and in view of the substantial number of partition cases in which notices were served, it seems unlikely that there were many partition cases where no notices were served.

applicable by Section 2 of that Act (Appendix, *infra,* p. 26). Under this Section all rights and causes of action which accrued to any Indian, his heirs or grantees, or to the United States on behalf of any such Indian, before or after the passage of the Act of 1926 are made subject to the statutes of limitation of the State of Oklahoma. In consequence, the United States is barred by the Oklahoma statutes of limitations from challenging title depending on any judgment in partition entered since 1918, except any such judgment so recent that the statute of limitations has not yet run.

The court below, however, rejected the applicability of the 1926 Act to partition proceedings under the 1918 Act (R. 30). The court reasoned that if the United States was an indispensable party under the 1918 Act, and if the 1926 Act governed procedure under the 1918 Act, then the court would be compelled to conclude that prior to the 1926 Act no procedure existed for suing the United States under the 1918 Act, and the United States being an indispensable party to a partition under that Act, no valid partition could have occurred prior to 1926, thus rendering the 1918 Act nugatory for the first eight years of its life. But this reasoning is fallacious, for it assumes, contrary to settled law, that in the absence of express assent to suit and detail of procedure, such as the 1926 Act,

the United States may not be joined as a defendant (but see *supra*, p. 14). Consequently, prior to the 1926 Act the consent of the United States to be joined in these partition proceedings was to be inferred from the necessity that it be joined to make the proceedings effectual. The absence of a federal statute detailing the procedure was immaterial since the 1918 Act provided for partition proceedings governed by Oklahoma law, under which the United States could be served as any other litigant. The enactment of the 1926 Act merely made the procedure in Section 3 thereof available as the means of serving and binding the United States, by providing a uniform procedure applicable to all suits involving interests in or title to land allotted to restricted members of the Five Civilized Tribes.

The purpose that the 1926 Act shall apply to partition proceedings under the 1918 Act is apparent from its broad language.[14] An exception must be read into that language which is not justified by its broad scope if it is not to apply to partition proceedings under the 1918 Act. Moreover, if partition proceedings are to be ex-

[14] The legislative history is inconclusive except that it also shows a broad purpose to establish certainty of titles derived from Indians by specifying how the United States may be concluded. Cf. *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Fixico*, 115 F. 2d 389 (C. C. A. 10). See H. Rep. 322, 69th Cong., 1st Sess.; S. Rep. 317, 69th Cong., 1st Sess.

cepted from the scope of section 3 they also must be excepted from the scope of section 2, which subjects claims of Indians and of the United States to the Oklahoma statutes of limitations. This likewise would be a *tour de force* unjustified by the broad language of the statute. It is plain from a consideration of sections 2 and 3 together that they were intended to apply to all land title proceedings involving members of the Five Civilized Tribes in which the United States might claim an interest or participation. In the future titles to such land could be secured against claims of the United States by use of the procedure set forth in section 3. Titles already secured as well as future titles were to be protected by the statute of limitations and the United States was, by section 2, given two years from the date of enactment in which to contest titles against which the statute otherwise would have run. No reason exists why this integrated scheme should be held inapplicable to the 1918 partition act.

If the decision below is permitted to stand litigants will not follow the present practice of serving notice on the Superintendent and thus the United States will be precluded from participating in the partition proceedings. On the other hand, if the decision below is reversed, the practice of the last 18 years of serving notice in partition proceedings under the 1926 Act will

be preserved and the interests of the United States and its restricted wards will be fully protected.

E. *The Government's position will not upset established land titles.*—Respondent has contended (Answer to Pet., p. 2) that the Government's position would, if accepted, overturn a rule of property on which established titles depend. Assuming that a rule of procedure can become a rule of property, and assuming further that the foundation exists on which the rule of property contended for can be based,[15] respondent's contention is nonetheless without merit. As we have shown, *supra*, pp. 18–22, the 1926 Act is applicable so that existing titles are protected by the facts that: (1) the procedure it prescribes has customarily been followed in partition suits with the result that the United States is expressly concluded in the bulk of the cases by having been served notice; and (2) in cases before 1926 and some since then in which the United States was not made a party or served notice the statute of limitations has run to prevent the United States from contesting the titles. Doubtless titles will be upset in any remaining cases but there is no reason to believe that that number will be sub-

[15] The decisions below are the first ones to hold specifically that the United States need not be joined. In the state court case relied on the United States was not made a party or notified and was not represented.

stantial.[16] Concern for the unknown but probably insubstantial number who could have but did not comply with the 1926 Act notwithstanding that compliance was customary, should not outweigh the real interest of the United States in having its interest recognized so that its guardianship of the Indian may be fulfilled.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[16] In such cases a purchaser at a partition sale has a personal right of action against the Indian. *Heckman* v. *United States*, 224 U. S. 413, 446. Also, he may have a cause of action against the sheriff for the recovery of the price paid. A partitioner can, of course, institute another partition proceeding.

APPENDIX

Sections 1 and 2 of the Act of June 14, 1918, 40 Stat. 606 (25 U. S. C. sec. 355, 375), provide:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided,* That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: *Provided further,* That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority

under existing laws: *Provided further,* That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving nonresident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

SEC. 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

Sections 2 and 3 of the Act of April 12, 1926, 44 Stat. 239, provide:

SEC. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, to the same ex-

tent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State; *Provided*, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations.

SEC. 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial

court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided;* That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending

in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

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